



# **Project BioShield: Authorities, Appropriations, Acquisitions, and Issues for Congress**

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## Summary

In 2004, Congress passed the Project BioShield Act (P.L. 108-276) to encourage the private sector to develop medical countermeasures to chemical, biological, radiological, and nuclear (CBRN) terrorism agents and to provide a novel mechanism for federal acquisition of those newly developed countermeasures. Although some countermeasures have been acquired through this law, Congress continues to address several Project BioShield-related policy issues. These include whether to continue diverting Project BioShield acquisition funding to other purposes; whether to change the countermeasure development and acquisition process; how to replace stockpiled countermeasures as they expire; and whether to alter federal efforts to encourage the development of broad-spectrum countermeasures.

This law provides three main authorities: (1) relaxing regulatory requirements for some CBRN terrorism-related spending, including hiring personnel and awarding research grants; (2) guaranteeing a federal market for new CBRN medical countermeasures; and (3) permitting emergency use of unapproved countermeasures. The Department of Health and Human Services (HHS) has used each of these authorities. The HHS used expedited review authorities to approve contracts and grants related to CBRN countermeasure research and development. The HHS used the authority to guarantee a government market to obligate approximately \$2 billion to acquire countermeasures against anthrax, botulism, radiation, and smallpox. The HHS has also employed the emergency use authority several times, including during the 2009 H1N1 influenza pandemic.

The Department of Homeland Security (DHS) Appropriations Act, 2004 (P.L. 108-90) advance-appropriated \$5.593 billion for FY2004 to FY2013 for CBRN countermeasures acquisition through Project BioShield. Subsequent Congresses have removed \$1.176 billion from this account through rescissions and transfers, more than 20% of the advance appropriation. The transfers from this account supported countermeasure advanced development, pandemic influenza preparedness and response, and basic research. The Full-Year Continuing Appropriations Act, 2011 (H.R. 1), as passed by the House, would transfer an additional \$188 million out of this account for advanced countermeasure development. The President's FY2012 budget requests a transfer of \$765 million out of this account to support countermeasure advanced development and to establish a medical countermeasure strategic investment corporation.

Since passing the Project BioShield Act, subsequent Congresses have considered additional measures to further encourage countermeasure development. The 109<sup>th</sup> Congress created the Biomedical Advanced Research and Development Authority (BARDA) in HHS through the Pandemic and All-Hazard Preparedness Act (P.L. 109-417). Among other duties, BARDA oversees all of HHS's Project BioShield procurements. The Pandemic and All-Hazard Preparedness Act also modified the Project BioShield procurement process. Some stakeholders question whether these changes have sufficiently improved federal countermeasure development and procurement. The Administration plans to improve the countermeasure research, development, and acquisition process based on the findings of an HHS review.

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## Introduction

Following the terrorist attacks of 2001, both the Executive Branch and Congress determined that the federal government needed new medical countermeasures (such as diagnostic tests, drugs, vaccines, and other treatments) to respond to an attack using chemical, biological, radiological, or nuclear (CBRN) agents. Representatives of the pharmaceutical industry attributed the paucity of CBRN agent countermeasures to the lack of a significant commercial market.<sup>1</sup> They argued that, because these diseases and conditions occur infrequently, the private sector perceived little economic incentive to invest the millions of dollars required to bring treatments to market.

In 2004, Congress passed the Project BioShield Act (P.L. 108-276) to encourage the development of CBRN medical countermeasures. The 108<sup>th</sup> Congress also appropriated \$5.6 billion to acquire countermeasures through Project BioShield for FY2004 to FY2013. Subsequent Congresses have evaluated implementation of Project BioShield. In response to perceived problems with Project BioShield countermeasure procurement, the 109<sup>th</sup> Congress created the Biomedical Advanced Research and Development Authority (BARDA) and the position of Assistant Secretary for Preparedness and Response in the Department of Health and Human Services (HHS) through the Pandemic and All-Hazards Preparedness Act (P.L. 109-417).

The 112<sup>th</sup> Congress may consider several Project BioShield-related policy issues. These include whether to continue diverting Project BioShield acquisition funding to other purposes; whether to change the countermeasure development and acquisition process; how to replace stockpiled countermeasures as they expire; and whether to alter federal efforts to encourage the development of broad-spectrum countermeasures.

## The Project BioShield Act

To encourage the development of new CBRN countermeasures, President Bush proposed Project BioShield in his 2003 State of the Union address. The 108<sup>th</sup> Congress considered this proposal and passed the Project BioShield Act of 2004 (P.L. 108-276, signed into law July 21, 2004).<sup>2</sup> It has three main provisions. The first provision provides HHS expedited procedures for CBRN terrorism-related spending, including procuring products, hiring experts, and awarding research grants. The second provision creates a government-market guarantee by permitting the HHS Secretary to obligate funds to purchase countermeasures while they still need several more years of development. The third provision authorizes the HHS Secretary to temporarily allow the emergency use of countermeasures that lack Food and Drug Administration (FDA) approval.

### Expedited Procedures

The act relaxes Federal Acquisition Regulation procedures HHS must follow when procuring property or services used in performing, administering, or supporting CBRN countermeasure

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<sup>1</sup> For example, Alan Pemberton, Pharmaceutical Research and Manufacturers of America, Testimony before the U.S. House of Representatives Select Committee on Homeland Security, May 15, 2003.

<sup>2</sup> For legislative history of this law, see CRS Report RL32549, *Project BioShield: Legislative History and Side-by-Side Comparison of H.R. 2122, S. 15, and S. 1504*, by Frank Gottron and Eric A. Fischer.

research and development (R&D). These expedited procedures decrease both the amount of paperwork required for these expenditures and the potential for oversight. The act also increases the maximum amount, from \$100,000 to \$25 million, for contracts awarded under simplified acquisition procedures, and allows these purchases using other than full and open competition. According to the Government Accountability Office (GAO), HHS used the simplified acquisitions procedure authority for five contracts. These contracts, all executed between 2004 and 2005 using funds from the National Institutes of Health (NIH), totaled approximately \$30 million.<sup>3</sup> Through December 2009, HHS had not exercised its authority to use other than full and open competition.<sup>4</sup>

The Project BioShield Act authorizes the HHS Secretary to use an expedited peer review award process for grants, contracts, and cooperative agreements related to CBRN countermeasure R&D, if the Secretary deems that a pressing need for an expedited award exists. The act limits this authority to awards worth \$1.5 million or less. This expedited award process replaces the normal peer review process. Some scientists have expressed concerns that an expedited review process would reduce research quality.<sup>5</sup> The normal peer review process can provide proposals with greater scientific merit a higher probability of receiving funding, a factor potentially lost in an expedited process. According to HHS, the National Institute of Allergy and Infectious Diseases (NIAID) awarded 5 contracts and 56 grants through this expedited peer review process through December 2009.<sup>6</sup> According to NIAID, grants that go through the normal peer review process typically take 9 to 18 months to receive funding.<sup>7</sup> Prior to 2009, NIAID awarded all of the expedited grants within 3 to 9 months after the application deadline. In 2009, NIAID awarded all 4 of its expedited grants between 18 and 20 months after the application deadline.<sup>8</sup>

## **Market Guarantee**

The Project BioShield Act is designed to guarantee companies that the government will buy new, successfully developed CBRN countermeasures for the Strategic National Stockpile (SNS).<sup>9</sup> The act allows the HHS Secretary, with the concurrence of the DHS Secretary and upon the approval of the President, to promise to buy a product up to eight years before it is reasonably expected to

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<sup>3</sup> These contracts are distinct from the contracts using Project BioShield funds described later in this report (see “Acquisitions”). The HHS used these contracts to purchase treatments for botulism and internal radioactive particle contamination. See U.S. Government Accountability Office, *Project BioShield: HHS Can Improve Agency Internal Controls for Its New Contracting Authorities*, GAO-09-820, July 21, 2009, p. 7.

<sup>4</sup> U.S. Government Accountability Office, *Project BioShield: HHS Can Improve Agency Internal Controls for Its New Contracting Authorities*, GAO-09-820, July 21, 2009; U.S. Department of Health and Human Services, *Project BioShield Annual Report to Congress August 2007 through December 2008*, 2009, p. 8; and *Project BioShield Annual Report to Congress January 2009-December 2009*, 2011, pp. 5-7.

<sup>5</sup> John Miller, “Interview with Richard Ebright,” *The Scientist*, vol. 17 (7), April 7, 2003, p. 52.

<sup>6</sup> See U.S. Department of Health and Human Services, *Project BioShield Annual Report to Congress July 2004-July 2006*, 2007, p. 2; *Project BioShield Annual Report to Congress August 2006-July 2007*, 2008, p. 32; *Project BioShield Annual Report to Congress August 2007 through December 2008*, 2009, p. 9; and *Project BioShield Annual Report to Congress January 2009-December 2009*, 2011, p. 6.

<sup>7</sup> See <http://funding.niaid.nih.gov/researchfunding/grant/pages/timelineresub.aspx>.

<sup>8</sup> U.S. Department of Health and Human Services, *Project BioShield Annual Report to Congress January 2009-December 2009*, 2011, p. 6.

<sup>9</sup> The SNS contains pharmaceuticals, vaccines, medical supplies, and medical equipment to respond to terrorist attacks and other emergencies.

be delivered.<sup>10</sup> Originally, HHS could pay a company only on the delivery of a substantial portion of the countermeasure. The Pandemic and All-Hazard Preparedness Act (P.L. 109-417) modified the Project BioShield Act to allow for milestone-based payments of up to half of the total award before delivery.<sup>11</sup> Therefore, this guarantee reduces the market risk for the company and the milestone payments partially reduce the company's exposure to development risk (i.e., the risk that the countermeasure will fail during testing and be undeliverable).

The Project BioShield Act allows HHS to purchase unapproved and unlicensed countermeasures. It requires the HHS Secretary to determine that "sufficient and satisfactory clinical experience or research data ... support a reasonable conclusion that the product will qualify for [FDA] approval or [HHS] licensing ... within eight years."<sup>12</sup> Because most drugs that begin these processes fail to become approved treatments, critics of this provision suggest that the government will end up purchasing countermeasures that may never be approved. To reduce the government's financial risk associated with this provision, the act allows HHS to write contracts in which unapproved products may be purchased at lower cost than approved products. The HHS used some of these authorities when structuring each of the Project BioShield contracts discussed below (see "Acquisitions" below).

## **Emergency Use of Unapproved Products**

The FDA and HHS designed their approval and licensing processes to protect people from ineffective or dangerous treatments. The Project BioShield Act allows the HHS Secretary to temporarily authorize the emergency use of medical products that are not approved by the FDA or licensed by HHS. To exercise this authority, the HHS Secretary must conclude that:

- the agent for which the countermeasure is designed can cause serious or life-threatening disease;
- the product may reasonably be believed to be effective in detecting, diagnosing, treating, or preventing the disease;
- the known and potential benefits of the product outweigh its known and potential risks;
- no adequate alternative to the product is approved and available; and
- any other criteria prescribed in regulation are met.<sup>13</sup>

Such emergency use authorizations (EUAs) remain in effect for one year unless the Secretary terminates them earlier. The Secretary may renew expiring authorizations.

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<sup>10</sup> President Bush delegated the presidential approval step to the Director of the Office of Management and Budget (OMB). The OMB retains this authority in the Obama Administration. See Executive Office of the President, "Designation and Authorization to Perform Functions under Section 319F-2 of the Public Health Service Act," 69 *Fed. Reg.* 70349, December 3, 2004.

<sup>11</sup> For more on this law, see CRS Report RL33589, *The Pandemic and All-Hazards Preparedness Act (P.L. 109-417): Provisions and Changes to Preexisting Law*, by Sarah A. Lister and Frank Gottron.

<sup>12</sup> 42 U.S.C. § 247d-6b(c).

<sup>13</sup> 21 U.S.C. § 360bbb-3(c). For more information on how the Secretary determines whether a product meets these conditions, see U.S. Department of Health and Human Services, Food and Drug Administration, *Guidance—Emergency Use Authorization of Medical Products*, July 2007, available at <http://www.fda.gov/RegulatoryInformation/Guidances/ucm125127.htm>.

The HHS Secretary has issued several EUAs. The HHS Secretary issued an EUA allowing the vaccination of Department of Defense (DOD) personnel with a specified type of anthrax vaccine.<sup>14</sup> The HHS Secretary issued EUAs to permit use of certain countermeasures during the 2009 H1N1 “swine” influenza outbreak:<sup>15</sup> the antiviral influenza treatments Tamiflu (oseltamivir), Relenza (zanamivir), and Peramivir;<sup>16</sup> N95 respirators; and several diagnostic kits to help identify cases of this disease.<sup>17</sup> The only EUA remaining active permits the distribution of antibiotic kits containing doxycycline hyclate to certain people participating in the Cities Readiness Initiative.<sup>18</sup>

## Reporting Requirements

The Project BioShield Act of 2004 requires the HHS Secretary to report annually to Congress on the use of some of the authorities granted by this law. The annual reports must summarize each instance that HHS used the expedited procurement and grant procedures and allowed the emergency use of unapproved products. The annual reports must explain why HHS needed to use these authorities. The HHS has produced four such reports to date.<sup>19</sup>

This act also requires GAO to assess actions taken under authorities granted by the act, determine the effectiveness of the act, and recommend additional measures to address deficiencies. In July 2009, GAO published two reports in response to this requirement. The first recommended that HHS improve some internal controls for the expedited contracting procedures (see “Expedited Procedures” above).<sup>20</sup> The second report described the manner in which HHS had used Project BioShield to support development and procurement of CBRN medical countermeasures.<sup>21</sup> This report contained no recommendations for improving Project BioShield.<sup>22</sup>

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<sup>14</sup> 70 *Fed. Reg.* 5452, February 2, 2005.

<sup>15</sup> For additional information, see CRS Report R40554, *The 2009 Influenza Pandemic: An Overview*, by Sarah A. Lister and C. Stephen Redhead; U.S. Department of Health and Human Services, *Project BioShield Annual Report to Congress January 2009-December 2009*, 2011, pp. 9-13; and <http://www.cdc.gov/h1n1flu/eua/>.

<sup>16</sup> Although Tamiflu and Relenza had been previously approved for treating influenza, the EUA allowed their use for infants and children younger than had been previously allowed. In contrast, Peramivir lacks FDA approval and its use is restricted to experimental trials; the EUA allowed its use outside experimental trials. Thus, after the EUAs expired in June 2010, Tamiflu and Relenza could continue to be sold and used, whereas hospitals were instructed to destroy any unused Peramivir.

<sup>17</sup> 75 *Fed. Reg.* 20441-20480, April 29, 2010.

<sup>18</sup> For more on this program, see <http://www.bt.cdc.gov/cr/>. This EUA was renewed through October 1, 2011. See 75 *Fed. Reg.* 61489.

<sup>19</sup> Available online at <https://www.medicalcountermeasures.gov/BARDA/bioshield/annualreport/annualreport.aspx>.

<sup>20</sup> U.S. Government Accountability Office, *Project BioShield: HHS Can Improve Agency Internal Controls for Its New Contracting Authorities*, GAO-09-820, July 21, 2009.

<sup>21</sup> U.S. Government Accountability Office, *Project BioShield Act: HHS Has Supported Development, Procurement, and Emergency Use of Medical Countermeasures to Address Health Threats*, GAO-09-878R, July 24, 2009, <http://www.gao.gov/new.items/d09878r.pdf>.

<sup>22</sup> Other BioShield-related GAO reports include *Anthrax: Federal Agencies Have Taken Some Steps to Validate Sampling Methods and to Develop a Next-Generation Anthrax Vaccine*, GAO-06-756T, May 9, 2006; and *Project BioShield: Actions Needed to Avoid Repeating Past Problems with Procuring New Anthrax Vaccine and Managing the Stockpile of Licensed Vaccine*, GAO-08-88, October 23, 2007.



## Appropriations, Rescissions, and Transfers

The Project BioShield Act did not appropriate any funds. Instead, it authorized the appropriation of up to a total of \$5.593 billion for procuring countermeasures from FY2004 through FY2013. The Department of Homeland Security Appropriations Act, 2004 (P.L. 108-90) had previously appropriated this amount into a special reserve fund and provided explicit time windows during which the money could be obligated. P.L. 108-90 specified that \$3.418 billion were available for obligation from FY2004 to FY2008. The balance of the advance appropriation plus unobligated funds remaining from FY2004 to FY2008 became available in FY2009 for obligation from FY2009 to FY2013. The Project BioShield Act specified that the funds in this DHS “Biodefense Countermeasures” account are only for the procurement of CBRN countermeasures using the Project BioShield authorities and may not be used for other purposes, such as countermeasure development grants or program administration.

The 111<sup>th</sup> Congress transferred the remaining balance in the DHS Biodefense Countermeasures account to the HHS Public Health and Social Services Emergency Fund account through the Consolidated Appropriations Act, 2010 (P.L. 111-117). Congress specified that these transferred funds are to remain available for obligation through FY2013 and to be used for only for Project BioShield-related countermeasure purchases. The Public Health and Social Services Emergency Fund account also contains non-Project BioShield-related money designated for other purposes.

While Congress advance-appropriated the 10-year program, it retains the power to increase or decrease the amount in the special reserve fund. Congress removed \$25 million from this account through rescissions enacted in the Consolidated Appropriations Act, 2004 (P.L. 108-199) and the Consolidated Appropriations Act, 2005 (P.L. 108-447). See **Table 1**.

Congress has also transferred funds from this account for purposes other than CBRN countermeasure procurement. The Omnibus Appropriations Act, 2009 (P.L. 111-8) transferred \$412 million to HHS from the special reserve fund. Of this amount, \$137 million went to help respond to and prepare for pandemic influenza and \$275 million went to fund countermeasure advanced development through the Biomedical Advanced Research and Development Authority (BARDA; see “BioShield and BARDA” below).<sup>23</sup> The Consolidated Appropriations Act, 2010 (P.L. 111-117) transferred \$609 million to HHS. Of this amount, \$305 million went to BARDA for countermeasure advanced development and \$304 million went to the National Institute of Allergy and Infectious Diseases (NIAID) to fund basic research on biodefense and emerging infectious diseases.<sup>24</sup> The Continuing Appropriations and Surface Transportation Extensions Act, 2011 (P.L. 111-322) transferred \$130 million to BARDA for countermeasure advanced development through March 4, 2011.<sup>25</sup> See **Table 1**.

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<sup>23</sup> P.L. 111-8 explanatory statement, *Congressional Record*, February 23, 2009, p. H2240.

<sup>24</sup> CRS personal communication with NIAID staff, October 26, 2010.

<sup>25</sup> This CRS-calculated amount represents the partial year funding at the FY2010 annualized amount as specified by P.L. 111-322.

**Table 1. Project BioShield Rescissions and Transfers**

Fiscal Year	Public Law	Purpose	Amount (\$ in millions)
2004	P.L. 108-199	Rescission	5
2005	P.L. 108-447	Rescission	20
2009	P.L. 111-8	Transfer for Advanced Development	275
		Transfer for Pandemic Flu Preparedness	137
2010	P.L. 111-117	Transfer for Advanced Development	305
		Transfer for NIAID Basic Research	304
2011	P.L. 111-242, P.L. 111-322	Transfer for Advanced Development	130 <sup>a</sup>
	H.R. 1	Transfer for Advanced Development (proposed)	188 <sup>b</sup>
2012	President's Budget Request	Transfer for Advanced Development (proposed)	665 <sup>c</sup>
		Transfer for Strategic Investment Corporation (proposed)	100
Rescissions and Transfers Enacted			1,176
Total Rescissions and Transfers Enacted and Proposed			2,129 <sup>d</sup>

**Source:** CRS analysis of P.L. 108-199; P.L. 108-447; P.L. 111-8; P.L. 111-117; P.L. 111-242; P.L. 111-322; H.R. 1; and OMB, Appendix: Budget of the United States Government, FY2012.

**Note:** Amounts rounded to nearest million.

- This figure represents the partial year funding transfer for operations through March 4, 2011, at FY2010 rates as specified by the Continuing Appropriations and Surface Transportation Extensions Act, 2011 (P.L. 111-322). Calculated by CRS.
- This figure represents the difference between the \$130 million transferred by P.L. 111-322 and the \$318 million H.R. 1 specifies for the total full year FY2011 transfer.
- The request states “up to \$665 million.”
- This total does not include the transfers requested by the President for FY2011 that Congress did not include in P.L. 111-322 or H.R. 1. These are discussed in the text.

In his FY2011 budget request, President Obama proposed transferring at least \$476 million of Project BioShield funds to BARDA for advanced development of CBRN countermeasures and administrative costs.<sup>26</sup> The Administration's proposal would also allow the HHS Secretary to transfer additional Project BioShield funds to support countermeasure development 15 days after notifying congressional appropriators. This requested authority has no explicit limit—all remaining Project BioShield funds would be eligible for such a transfer. President Obama has also submitted a FY2011 budget amendment that would transfer an additional \$400 million out of the Project BioShield funds.<sup>27</sup> Of this amount, \$200 million would be transferred to the Department of Defense (DOD) to help establish the Technical Center of Excellence for Advanced Development and Manufacturing. The remaining \$200 million would be used to establish an

<sup>26</sup> U.S. Department of Health and Human Services, *FY2011 Public Health and Social Services Emergency Fund Justification of Estimates for Appropriations Committees*, p. 13.

<sup>27</sup> The Executive Office of the President, *FY 2011 Budget Amendment Estimate No. 10*, August 20, 2010, [http://www.whitehouse.gov/sites/default/files/omb/assets/budget\\_amendments/amendment\\_08\\_20\\_10\\_0.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/budget_amendments/amendment_08_20_10_0.pdf). The Senate Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education and Related Agencies, held a hearing to discuss this request on September 29, 2010.

independent medical countermeasure strategic investment corporation. Although Congress transferred money for BARDA countermeasure advanced development in the Continuing Appropriations and Surface Transportation Extensions Act, 2011 (P.L. 111-322), it did not grant the other transfer requests. Congress may choose to address the President's remaining requests in subsequent FY2011 appropriation acts. The Full Year Continuing Appropriations Act, 2011 (H.R. 1), as passed by the House, specifies a full year FY2011 transfer of \$318 million to BARDA for countermeasure advanced development.<sup>28</sup> It would not grant the President's other requested transfers. See **Table 1**.

In his FY2012 budget request, President Obama proposed transferring up to \$765 million out of Project BioShield appropriated funds for other purposes. Of this amount, up to \$600 million would be transferred for BARDA for advanced development of CBRN countermeasures and \$65 million for BARDA administrative costs.<sup>29</sup> The remaining \$100 million of the requested transfer would establish an independent medical countermeasure strategic investment corporation.<sup>30</sup> See **Table 1**.

## Acquisitions

The first Project BioShield contract was announced on November 4, 2004.<sup>31</sup> The HHS contracted with VaxGen, Inc., for delivery of 75 million doses of a new type of anthrax vaccine (recombinant protective antigen or rPA) within three years. This contract had a value of \$879 million. See **Table 2**. On December 17, 2006, HHS terminated this contract because VaxGen, Inc., failed to meet a contract milestone.<sup>32</sup> Subsequent contracts include:

- \$691 million for 29 million doses of the currently approved anthrax vaccine (anthrax vaccine adsorbed or AVA) from Emergent BioSolutions, Inc.;
- \$326 million for 65,000 doses of Raxibacumab (ABthrax), a treatment for anthrax, from Human Genome Sciences, Inc.;
- \$144 million for 10,000 doses of Anthrax Immune Globulin, a treatment for anthrax, from Cangene Corporation;
- \$505 million for 20 million doses of a new smallpox vaccine (Modified Vaccinia Ankara or MVA) from Bavarian Nordic, Inc.;
- \$414 million for 200,000 doses of botulinum antitoxin, a treatment for botulinum toxin exposure, from Cangene Corporation;

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<sup>28</sup> Thus, accounting for the \$130 million transferred under P.L. 111-322 for partial year funding, H.R. 1 would transfer an additional \$188 million.

<sup>29</sup> U.S. Department of Health and Human Services, *Public Health and Social Services Emergency Fund Justification of Estimates for Appropriations Committees FY2012*, p. 49.

<sup>30</sup> U.S. Department of Health and Human Services, *Public Health and Social Services Emergency Fund Justification of Estimates for Appropriations Committees FY2012*, pp. 49 and 56.

<sup>31</sup> For the status of current requests and contracts, see the U.S. Department of Health and Human Services Project BioShield procurement page at <https://www.medicalcountermeasures.gov/BARDA/procurement/CBRN.aspx>. For issues regarding these awards, see CRS Report RL33907, *Project BioShield: Appropriations, Acquisitions, and Policy Implementation Issues for Congress*, by Frank Gottron.

<sup>32</sup> U.S. Department of Health and Human Services, "Termination Letter - Contract No. HHSO100200500001C," Letter to VaxGen, Inc., December 19, 2006.

- \$18 million for 5 million doses of a pediatric form of potassium iodide, a treatment for radioactive iodine exposure, from Fleming Pharmaceuticals; and
- \$22 million for 395,000 doses of pentetate calcium trisodium (also known as Ca-DTPA) and 80,000 doses of pentetate zinc trisodium (also known as Zn-DTPA), two treatments for internal radioactive particle contamination, from Akorn, Inc.

Thus, excluding the canceled VaxGen contract, HHS has obligated approximately \$2.122 billion to date. Future targets for Project BioShield procurement include countermeasures against anthrax, smallpox, viral hemorrhagic fevers, and radiation.<sup>33</sup>

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<sup>33</sup> U.S. Department of Health and Human Services, Public Health Emergency Medical Countermeasure Enterprise, “Implementation Plan for Chemical, Biological, Radiological and Nuclear Threats,” 72 *Fed. Reg.* 20122, April 23, 2007; U.S. Department of Health and Human Services, *Project BioShield Annual Report to Congress January 2009-December 2009*, 2011, p. 9; and U.S. Department of Health and Human Services, *Public Health and Social Services Emergency Fund Justification of Estimates for Appropriations Committees FY2012*, pp. 57-63.

**Table 2. Project BioShield Acquisition Activity**

Threat	Product	Doses (thousands)	Cost (\$ millions)	Company	Award Date
<b>Anthrax</b>	rPA vaccine	75,000	879 <sup>a</sup>	VaxGen, Inc.	11/4/04; Cancelled 12/19/06
	AVA vaccine	28,750	691 <sup>b</sup>	Emergent BioSolutions, Inc. (formerly BioPort Corp.)	5/6/05; 5/5/06; 9/25/07
	Raxibacumab	65	326	Human Genome Sciences, Inc.	6/19/06; 7/29/2009
	Anthrax Immune Globulin	10	144	Cangene Corp.	7/28/06
<b>Smallpox</b>	MVA vaccine	20,000	505	Bavarian Nordic, Inc.	6/4/07
<b>Botulinum Toxin</b>	Botulinum Antitoxin	200	414 <sup>c</sup>	Cangene Corp.	6/1/06
<b>Radiological/ Nuclear</b>	Potassium Iodide	4,800	18	Fleming Pharmaceuticals	3/18/05 and 2/8/06
	Ca-DTPA	395			
	Zn-DTPA	80	22	Akorn, Inc.	2/13/06
<b>Total Announced Awards:</b>			<b>2,999</b>		
<b>Total Announced Obligations:</b>			<b>2,122<sup>d</sup></b>		

**Source:** CRS analysis of HHS, *Project BioShield: Annual Report to Congress July 2004-July 2006*; HHS, *Project BioShield: Annual Report to Congress August 2006-July 2007*; HHS, *Project BioShield Annual Report to Congress August 2007 through December 2008*; HHS, *Project BioShield Annual Report to Congress January 2009-December 2009*; DHS, Office of Health Affairs, *Biodefense Countermeasures Congressional Justification FY2010*; and personal communications with HHS, June 8, 2009, and December 29, 2010.

- This figure includes approximately \$1.5 million that HHS paid to VaxGen, Inc. for mandatory security upgrades. When HHS terminated the vaccine contract, VaxGen, Inc. kept this amount, while approximately \$877 million obligated for the vaccine became available for other Project BioShield procurements. Personal communication with BARDA, June 8, 2009.
- This total does not include a \$405 million contract for 14.5 million doses of AVA anthrax vaccine that HHS announced on September 30, 2008. According to HHS, this contract used Centers for Disease Control and Prevention funds rather than the Project BioShield special reserve fund. Personal communication with BARDA, June 8, 2009.
- This figure includes \$50 million HHS obligated from the Project BioShield special reserve fund to this company in FY2004 after the DHS Appropriations Act, 2004, funded this account but before passage of the Project BioShield Act. See HHS, *Project BioShield: Annual Report to Congress July 2004-July 2006*, p. 31.
- Announced awards minus \$877 million for the cancelled rPA contract (see note a).

## BioShield and BARDA

Congressional policymakers have scrutinized the implementation and effectiveness of the Project BioShield Act since its enactment. In response to perceived problems with Project BioShield countermeasure procurement, the 109<sup>th</sup> Congress created the Biomedical Advanced Research and Development Authority (BARDA) in HHS through the Pandemic and All-Hazards Preparedness Act (P.L. 109-417). In addition to funding the advanced development of countermeasures, BARDA executes all Project BioShield contracts. However, BARDA does not determine the specific countermeasure requirements. The Office of Policy and Planning in the Office of the HHS Assistant Secretary for Preparedness and Response (ASPR) determines the requirements.<sup>34</sup>

Many congressional policymakers had concluded that the Project BioShield Act had insufficiently encouraged the transition of promising basic research results into the product development stage. This period is often referred to as the “valley of death” because some seemingly promising products are not developed past this point due to lack of funding. As discussed above, Congress amended the Project BioShield Act through the Pandemic and All-Hazards Preparedness Act to allow HHS to pay up to half a Project BioShield contract’s value in a series of sequential milestone payments. Thus, companies could receive payments while continuing to develop their promising product. Additionally, Congress created in BARDA a dedicated infrastructure to manage and fund advanced development and commercialization of CBRN countermeasures. In theory, industry can use BARDA funding to take promising drugs from the basic research through the advanced development stage, which may include clinical trials. Congress created the Biodefense Medical Countermeasure Development Fund to pay for such advanced development contracts. Although this account is separate from the Project BioShield special reserve fund, Congress has repeatedly funded the advanced development account through transfers from the Project BioShield account (see **Table 1**).

Critics of government funding for advanced development suggest that, because of the high product failure rate, the government will inevitably fund unusable products. In addition to removing the development risks traditionally borne by industry, critics argue, directly funding advanced development inserts government decision-makers into the countermeasure development process—a role better suited to industry experts and entrepreneurs.<sup>35</sup> Some critics would prefer to have the government set product requirements and have industry determine how best to meet them. As originally enacted, Project BioShield took this latter approach, which Congress subsequently found insufficient in this particular case.

## Policy Issues

Congress continues to address several Project BioShield-related policy issues. These include whether to continue diverting Project BioShield acquisition funding to other purposes; whether to change the countermeasure development and acquisition process; how to replace stockpiled

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<sup>34</sup> U.S. Department of Health and Human Services, *Public Health and Social Services Emergency Fund Justification of Estimates for Appropriations Committees FY2012*, p. 68.

<sup>35</sup> For more on these assertions, see CRS Report RL33528, *Industrial Competitiveness and Technological Advancement: Debate Over Government Policy*, by Wendy H. Schacht.

countermeasures as they expire; and whether to alter federal efforts to encourage the development of broad-spectrum countermeasures.

## **Diversion of BioShield Funds for Other Purposes**

One of the distinguishing features of Project BioShield is the 10-year \$5.6 billion advance appropriation. Potential countermeasure developers considered the establishment of a separate, advance-funded account dedicated solely to countermeasure procurement as integral to their participation in this program. The advance funding helped assure developers that payment for successfully developed countermeasures would not depend on future, potentially uncertain appropriations processes. Although advance-funding the Project BioShield account may have provided some assurance of funding stability to developers, in practice, these funds have been subject to the annual appropriations process. Subsequent Congresses have rescinded or transferred more than 20% of the advance appropriation. Additional transfers proposed by Congress and the President for FY2011 and FY2012, if enacted, would increase the total amount rescinded and transferred out of this fund to more than 35% of the initial advance appropriation. See **Table 1**. These transfers fall into two categories: those directly related to CBRN countermeasures research and development and those used for purposes unrelated to CBRN countermeasures.

One interpretation of the transfers out of this account is that Congress and the President are adjusting the amount of funds available so that they track more closely with the actual ability of HHS to obligate them. In appropriating \$5.6 billion over ten years for Project BioShield, Congress anticipated an average obligation rate of \$560 million per year. However, HHS has obligated these funds at a slower pace, an average of \$300 million annually. If Congress had not made rescissions and transfers to other accounts, HHS would have needed to obligate an average of \$1.16 billion annually from FY2011 to FY2013 to exhaust the fund before its expiration. After accounting for the enacted rescissions and transfers, HHS now would need to obligate an average of \$765 million annually from FY2011 to FY2013 to exhaust the fund before its expiration. This rate exceeds both Congress's anticipated obligation rate of \$560 million annually and HHS's historical obligation rate of \$300 million annually.

As it considers additional FY2011 funding, Congress may also consider additional transfers out of the Project BioShield special reserve fund including those requested by the President. As discussed above, Congress granted some of the President's FY2011 transfer requests. Under the Continuing Appropriations and Surface Transportation Extensions Act, 2011 (P.L. 111-322), Congress did not authorize the full amount of the administration's request to support advanced development. Furthermore, Congress chose not to authorize the requested \$400 million transfer to support the DOD Technical Center of Excellence for Advanced Development and Manufacturing and the independent medical countermeasure strategic investment corporation. As Congress determines the level of additional FY2011 appropriations, it may also consider these requests. H.R. 1, as passed by the House, would transfer an additional \$188 million to support countermeasure development for FY2011 and would not grant the President's other transfer requests. If enacted, the transfer in H.R. 1 would leave enough funds available in the BioShield account to allow HHS to obligate an average of \$700 million annually for FY2011 to FY2013.

The President's FY2012 budget request requests the transfer of up to \$765 million to fund BARDA activities and an independent medical countermeasure strategic investment corporation. If Congress enacts these transfers, the total amount of rescissions and transfers out of this account would exceed the amount that has been used to procure CBRN countermeasures to date.

However, HHS would still need to obligate an average of \$670 million annually in FY2012 and FY2013 to exhaust the fund before its expiration.<sup>36</sup>

## **Transfers for CBRN Countermeasure Research and Development**

Congress transferred a total of \$710 million from the special reserve fund to BARDA to support CBRN countermeasure advanced research and development for FY2009-FY2011. The Administration justified its requests for such transfers by asserting that these funds will support “future successful acquisitions of medical countermeasures under Project BioShield.”<sup>37</sup> Thus, Congress could view such transfers as an attempt to improve the “lower than expected” rate of Project BioShield acquisitions.<sup>38</sup> In FY2010, citing similar reasons, Congress transferred an additional \$304 million to NIAID, some of which was used for biodefense related research.<sup>39</sup>

This pattern of annual transfers from the Project BioShield special reserve fund to support countermeasure research and development activities may affect future CBRN countermeasure development and procurement activities. Continued transfers would reduce the amount of money available for countermeasure procurement, could affect the willingness of developers to participate in Project BioShield, and might change the respective roles of the federal government and private developers in countermeasure development.

Annual transfers from this account to fund countermeasure research and development would continue to lower the amounts available for procuring CBRN countermeasures, their originally intended purpose. However, if funding began to constrain countermeasure procurement, Congress could reverse this course and appropriate additional money for Project BioShield acquisitions.<sup>40</sup>

Congress attempted to address developers’ concern regarding the consistent availability of funding for countermeasure procurement by providing a 10-year advance appropriation. Continuing the pattern of annual transfers out of this fund, even with the potential for additional appropriations in future years, might cause potential countermeasure developers to feel dependent on the actions of future appropriators, precisely the situation that establishment and advance funding of the special reserve fund was designed to ameliorate. If potential countermeasure developers feel more dependent on the actions of future appropriators, they may be less inclined to begin or continue countermeasure development.

Industry representatives reportedly have asserted that transferring money from this account weakens the ability of private firms to raise the capital necessary to sustain long-term research and development for countermeasures and hinders their potential participation in Project

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<sup>36</sup> Obligations in FY2011 would reduce the amount available for FY2012 and FY2013.

<sup>37</sup> U.S. Department of Health and Human Services, *FY2010 Congressional Justification for the Public Health and Social Services Emergency Fund*, p. 46.

<sup>38</sup> U.S. Department of Homeland Security, Office of Health Affairs, *Biodefense Countermeasures Congressional Justification FY2010*, p. BIO-2.

<sup>39</sup> H.Rept. 111-220, p. 194. NIAID did not track what portion of the transferred money funded CBRN countermeasure research, rather they stated that the funds were used for research on “biodefense and other emerging infectious diseases.” NIAID staff, personal communication with CRS, October 27, 2010.

<sup>40</sup> In the 111<sup>th</sup> Congress the House Committee on Appropriations suggested that it would consider adding additional funds to the special reserve fund in the future. See H.Rept. 111-220, p. 194.



BioShield.<sup>41</sup> On the other hand, transferring funds to support advanced development may reduce the amount that developers need to raise from other sources.

Funding transfers may also modify the relative roles of the federal government and the private sector in Project BioShield. Congress originally designed Project BioShield to minimize the risk that the government would pay for countermeasures that fail during development (see “Market Guarantee” above). Congress expected developers to manage this risk, using the government-market guarantee to entice investors to fund countermeasure development. However, in using Project BioShield transfers to fund countermeasure development directly, the government assumes more of the development risk.

## **Transfers Unrelated to CBRN Countermeasure Research and Development**

Two of the transfers out of the Project BioShield special reserve fund supported programs not directly related to medical countermeasures to CBRN agents. In FY2009, Congress transferred \$137 million from the Project BioShield special reserve fund to HHS for pandemic influenza preparedness and response. In FY2010, an indeterminate amount of the \$304 million transferred to NIAID supported basic research on emerging infectious disease.<sup>42</sup>

Additionally, the President and previous Congresses have considered other proposals to use Project BioShield funds for purposes not related to CBRN countermeasures. President Obama requested that the conference committee on the Supplemental Appropriations Act, 2009 (P.L. 111-32) allow the purchase of influenza countermeasures using the Project BioShield special reserve fund.<sup>43</sup> The conferees declined to provide this authority.<sup>44</sup> Similarly, in the Senate report to accompany the Department of Homeland Security Appropriations Act, 2010, the committee “strongly” urged not using the special reserve fund to purchase influenza countermeasures.<sup>45</sup> The 111<sup>th</sup> Congress considered using the unobligated Project BioShield money to offset spending for other purposes. The House passed a version of the Disaster Relief and Summer Jobs Act of 2010 that would have rescinded up to \$2 billion Project BioShield funds.<sup>46</sup> The enacted version (P.L. 111-212) lacked this rescission. Reportedly, the Senate considered using Project BioShield funds to pay for settlements reached in the Indian Trust Fund litigation and discrimination lawsuits against the Department of Agriculture.<sup>47</sup>

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<sup>41</sup> Eric A. Rose, CEO and Chairman, Siga Technologies Testimony before the U.S. Senate Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education and Related Agencies, September 29, 2010; and Spencer Hsu, “Bipartisan WMD Panel Criticizes Obama Plan To Fund Flu Vaccine,” *Washington Post*, June 8, 2009.

<sup>42</sup> NIAID staff, personal communication with CRS, October 27, 2010.

<sup>43</sup> Letter from President Barack Obama to Speaker of the House Nancy Pelosi, June 2, 2009, [http://www.whitehouse.gov/omb/assets/budget\\_amendments/supplemental\\_06\\_02\\_09.pdf](http://www.whitehouse.gov/omb/assets/budget_amendments/supplemental_06_02_09.pdf).

<sup>44</sup> P.L. 111-32 and H.Rept. 111-151.

<sup>45</sup> S.Rept. 111-31, p. 96.

<sup>46</sup> 111<sup>th</sup> Congress, H.R. 4899.

<sup>47</sup> Ellyn Ferguson, “Senate Tries Again on Settlement for American Indians, Black Farmers,” *CQ Today Online News*, July 30, 2010. For more on these settlements, see CRS Report RL34628, *The Indian Trust Fund Litigation: An Overview of Cobell v. Salazar*, by Todd Garvey and CRS Report RS20430, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, by Tadlock Cowan and Jody Feder.

Critics charge such diversions damage the biodefense countermeasure industry by undercutting the market guarantee at the heart of Project BioShield. Other critics state that such moves “severely diminish the nation’s efforts to prepare for WMD [weapon of mass destruction] events” and “will leave the nation less, not more, prepared.”<sup>48</sup> However, as fiscal pressure increases on the federal government, unobligated Project BioShield funds may become an increasingly tempting target for either rescission or diversion.

## **Changing the Countermeasure Development and Acquisition Process**

Project BioShield represents just one piece of the federal effort to research, develop, and acquire countermeasures for civilian use. Other important aspects of this effort include risk assessment, strategic planning, countermeasure prioritization, basic research, countermeasure approval, and countermeasure distribution. Various federal agencies and departments have roles in different parts of this effort.<sup>49</sup> The Institute of Medicine and the National Biodefense Science Board examined the federal government’s biodefense efforts and concluded that better coordination and stronger management of the overall process would increase the pace of countermeasure development and acquisition. Additional recommendations include empowering a single office to have the authority and responsibility to align component agencies’ efforts; developing a coordinated budget request for HHS and DOD agencies involved in countermeasure development, approval, and acquisition; developing a common set of prioritized product needs and research goals to support them; and increasing the funding available for countermeasure acquisition and advanced development.<sup>50</sup>

In December 2009, Secretary Sebelius ordered a comprehensive review of how HHS develops and acquires countermeasures to all public health threats, including CBRN agents.<sup>51</sup> In August 2010, HHS published the results of its review and recommendations to improve how the federal government supports medical countermeasure development.<sup>52</sup> The report separated its recommendations into two categories: new infrastructure initiatives and medical countermeasure enterprise enhancements. Some of the proposed changes will require congressional action, either for appropriations to fund the proposals or explicit authorization for new programs.

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<sup>48</sup> Letter from Senator Bob Graham, Chairman of the Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism, and Senator Jim Talent, Vice Chairman of the Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism, to President Obama, June 8, 2009, [http://www.preventwmd.gov/6\\_8\\_2009/](http://www.preventwmd.gov/6_8_2009/); Spencer Hsu, “Bipartisan WMD Panel Criticizes Obama Plan To Fund Flu Vaccine,” *Washington Post*, June 8, 2009; and Matt Korade, “Lawmakers, Industry Jeer Plan to Fund Flu Preparedness With Bioshield Money,” *CQ Homeland Security*, June 9, 2009.

<sup>49</sup> For additional information, see CRS Report R41123, *Federal Efforts to Address the Threat of Bioterrorism: Selected Issues and Options for Congress*, by Frank Gottron and Dana A. Shea.

<sup>50</sup> Institute of Medicine, Board on Health Sciences Policy, *The Public Health Emergency Medical Countermeasures Enterprise Innovative Strategies to Enhance Products from Discovery Through Approval: Workshop Summary*, National Academies Press, 2010; and National Biodefense Science Board, *Where Are the Countermeasures? Protecting America’s Health from CBRN Threats*, March 2010.

<sup>51</sup> Secretary of Health and Human Services Kathleen Sebelius, remarks to The American Medical Association Third National Congress on Health System Readiness, Washington, DC, December 1, 2009.

<sup>52</sup> U.S. Department of Health and Human Services, Assistant Secretary for Preparedness and Response, *The Public Health Emergency Medical Countermeasures Enterprise Review: Transforming the Enterprise to Meet Long-Range National Needs*, August 2010.

The review recommended new infrastructure to help the FDA improve its evaluation of medical countermeasures. These recommendations include developing a “stronger, expert scientific workforce” for medical countermeasure review, advancing regulatory science, identifying and qualifying animal disease models, and developing “action teams” to help medical countermeasure developers to identify and resolve potential regulatory barriers as early as possible. The review also recommended that the FDA consider whether new legal authorities such as a “restricted or conditional license” would improve preparedness and response to a CBRN attack. The President’s FY2012 budget requests \$70 million to support these efforts.<sup>53</sup>

The review called for the creation of one or more Centers for Innovation in Advanced Development and Manufacturing in HHS. These Centers would be public-private partnerships to provide developers with manufacturing expertise drawn from experienced biotech or pharmaceutical manufacturers.<sup>54</sup> The HHS will require that these facilities be able to provide vaccine manufacturing surge capacity to help the federal government respond to any serious disease threat, including pandemic influenza. The HHS will build these Centers using funds appropriated for responding to pandemic influenza under the Supplemental Appropriations Act, FY2009 (P.L. 111-32).<sup>55</sup> The DOD plans to build a similar center. President Obama requested a FY2011 transfer of \$200 million from the Project BioShield special reserve fund to build the DOD facility. Congress did not approve this transfer in the Continuing Appropriations and Surface Transportation Extensions Act, 2011 (P.L. 111-322). H.R. 1, as passed by the House, would also not approve this transfer.

The review also recommended creating a private strategic investment corporation to inject capital into small companies developing novel technologies that could support public health needs and medical countermeasure development.<sup>56</sup> The HHS modeled this corporation after In-Q-Tel, a private corporation founded by the government to serve the needs of the intelligence community.<sup>57</sup> President Obama requested a FY2011 transfer of \$200 million from the Project BioShield special reserve fund to initially fund the corporation. Congress did not approve the transfer of funds in the Continuing Appropriations and Surface Transportation Extensions Act, 2011 (P.L. 111-322). H.R. 1, as passed by the House, would not grant this transfer. For FY2012, President Obama requested a transfer of \$100 million from the Project BioShield special reserve

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<sup>53</sup> U.S. Department of Health and Human Services, *Food and Drug Administration: Justification of Estimates for Appropriations Committees FY 2012*, pp. 9-20.

<sup>54</sup> See U.S. Department of Health and Human Services, “Establishing Centers of Innovation for Advanced Development and Manufacturing (ADM) as Public – Private Partnerships” Request for Proposals DRAFT-AMCG-10-39, September 15, 2010, available online at <https://www.fbo.gov>.

<sup>55</sup> Robin Robinson, Director of the Biomedical Advanced Research and Development Authority, Deputy Assistant Secretary of Health and Human Services for Preparedness and Response, personal communication with CRS, August 24, 2010 and January 11, 2011. The HHS has also stated that “construction of new or renovated facilities in the U.S. will be supported with \$478 million in existing pandemic influenza funding.” See U.S. Department of Health and Human Services, *Public Health and Social Services Emergency Fund Justification of Estimates for Appropriations Committees FY2012*, p. 97.

<sup>56</sup> For a description of HHS plans for this corporation, see U.S. Department of Health and Human Services, *Public Health and Social Services Emergency Fund Justification of Estimates for Appropriations Committees FY2012*, p. 56.

<sup>57</sup> Although analysts generally consider In-Q-Tel a success, other similar corporations established for other agencies have been less successful. See Thomas J. Benjamin, Mary T. Tyszkiewicz, and Deborah Prigal, et al., *Venture Capital Concept Analysis Final Report*, Homeland Security Institute, December 2005; and John M. Nolan, Emad U. Samad, and Lawrence F. Jindra, et al., “Seeking Innovation: Incentive Funding for Biodefense Biotech,” *Biosecurity and Bioterrorism: Biodefense Strategy, Practice, and Science*, vol. 8, no. 4 (2010), pp. 365-372.

fund to initially fund the corporation. The HHS asserts that the language in President's FY2012 budget request would also provide sufficient statutory authority to create such a corporation.<sup>58</sup>

The review recommended establishing "Early Development Teams" within NIAID. These teams would aim to help investigators identify research findings with potential CBRN medical countermeasure applications and help identify potential government funding streams and potential private partners.<sup>59</sup>

The HHS review also recommended changes to the medical countermeasure enterprise management. The review determined that the HHS's medical countermeasure decision making process would be improved by creating a centralized decision making body and by creating and implementing a "disciplined, metric-driven, systematic" decision-making process.<sup>60</sup> Additionally, the review recommended the creation of new position, the Medical Countermeasure (MCM) Development Leader, to coordinate and integrate medical countermeasure development efforts throughout the Department. The review also determined that HHS should institute a five-year budget planning system for medical countermeasure development activities.

Any changes to the medical countermeasure development process, including those proposed by the HHS review, may draw congressional interest. Previous congresses enacted laws and performed oversight on the medical countermeasure development process, including creating Project BioShield, BARDA, and the Assistant Secretary for Preparedness and Response (ASPR) in part to improve management and accountability of countermeasure procurement. Congress may take an interest in any proposed changes to the roles that it assigned BARDA or ASPR. Additionally, congressional policymakers may chose to scrutinize the proposed changes to determine whether they will increase the successful development and acquisition of CBRN countermeasures for the national stockpile in a cost efficient manner.

## **Stockpile Management**

All medicines, including those added to the Strategic National Stockpile (SNS) through Project BioShield, have explicit expiration dates. The federal government does not allow the use of expired medicines. Countermeasure expiration raises at least two stockpile management issues: what to do with expiring countermeasures and how to replace them.

In 2007, the GAO suggested that HHS and DOD establish an inventory-sharing agreement. The agreement would allow DOD to use HHS-stockpiled vaccine in its anthrax vaccination program before expiration.<sup>61</sup> These agencies subsequently implemented a shared stockpile approach for both anthrax vaccines and pandemic influenza countermeasures.<sup>62</sup> However, this shared stockpile

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<sup>58</sup> U.S. Department of Health and Human Services, *Public Health and Social Services Emergency Fund Justification of Estimates for Appropriations Committees FY2012*, p. 13.

<sup>59</sup> HHS Secretary Sebelius, Testimony before the U.S. Senate Committee on Appropriations, Subcommittee on Labor, Health and Human Services, Education and Related Agencies, September 29, 2010.

<sup>60</sup> U.S. Department of Health and Human Services, Assistant Secretary for Preparedness and Response, *The Public Health Emergency Medical Countermeasures Enterprise Review: Transforming the Enterprise to Meet Long-Range National Needs*, August 2010, p. 17.

<sup>61</sup> Government Accountability Office, *Project BioShield: Actions Needed to Avoid Repeating Past Problems with Procuring New Anthrax Vaccine and Managing the Stockpile of Licensed Vaccine*, GAO-08-88, October 2007.

<sup>62</sup> Robin Robinson, Director of the Biomedical Advanced Research and Development Authority, Deputy Assistant Secretary of Health and Human Services for Preparedness and Response, testimony before the U.S. House of (continued...)

solution only applies to countermeasures having high-volume users. For other countermeasures such as smallpox vaccine, HHS may have to discard expired countermeasures and replace them without compensation.

Additionally, HHS must procure for the SNS a number of doses greater than that stored at any given time. For example, HHS had to buy 29 million doses of anthrax vaccine through periodic purchases to maintain a stockpile of at least 10 million doses from 2006 to 2011.<sup>63</sup> HHS may require additional periodic countermeasure purchases to maintain a consistent readiness level and replenish the stockpile as the countermeasures expire. Congress may consider whether such purchases should be funded through the advance-appropriated Project BioShield account or through annual SNS appropriations. Between 2005 and 2007, BARDA purchased the AVA anthrax vaccine using Project BioShield funds (**Table 2**). However in 2008, HHS switched funding sources for this vaccine and used SNS funds to purchase additional doses of AVA vaccine.<sup>64</sup> This use of SNS funds presents an “ongoing challenge” to the Centers for Disease Control and Prevention that manage the SNS, as they are not generally funded for the maintenance and replacement of countermeasures procured through Project BioShield or BARDA.<sup>65</sup>

## Broad-Spectrum Countermeasures

Many experts contend that broad-spectrum countermeasures, those that address multiple CBRN agents, would be the most valuable additions to the SNS.<sup>66</sup> Such nonspecific countermeasures might be a defense against currently unknown threats, such as emerging diseases or genetically engineered pathogens. Furthermore, such countermeasures are likely to have nonbiodefense-related applications as well. The Project BioShield Act does not exclude procuring such countermeasures, but it does require that the presence of another commercial market be factored into the HHS Secretary’s decision to purchase the countermeasure. The HHS has stated its interest in using Project BioShield to acquire new broad-spectrum countermeasures.<sup>67</sup> However, Project BioShield contracts to date have specifically targeted individual threat agents, a strategy commonly described as “one bug, one drug.” According to HHS, BARDA awarded its first

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(...continued)

Representatives Committee on Appropriations, Subcommittee on Defense, April 24, 2008.

<sup>63</sup> U.S. Department of Health and Human Services, “HHS Purchases Additional Anthrax Vaccine for Stockpile,” *News Release*, September 26, 2007.

<sup>64</sup> BARDA staff, personal communication with CRS, June 8, 2009.

<sup>65</sup> Ali S. Kahn, Director, Office of Public Health Preparedness and Response, Centers for Disease Control and Prevention, “Implementing the Recommendations of the Secretary’s Medical Countermeasure Review,” Public Health Emergency Medical Countermeasures Enterprise Stakeholders Workshop, Washington, DC, January 11, 2011.

<sup>66</sup> Some broad-spectrum treatments are available. For example, antibiotics such as ciprofloxacin can be used against several bacterial diseases. In contrast, antivirals that have similar broad-spectrum properties and treatments that target common disease pathways, such as sepsis, remain targets for development. For a discussion of such countermeasures, see Gigi Gronvall, Jason Matheny, and Bradley Smith, et al., “Flexible Defenses Roundtable Meeting: Promoting the Strategic Innovation of Medical Countermeasures,” *Biosecurity and Bioterrorism: Biodefense Strategy, Practice, and Science*, vol. 5, no. 3 (2007), pp. 271-277.

<sup>67</sup> U.S. Department of Health and Human Services, Public Health Emergency Medical Countermeasure Enterprise, “Implementation Plan For Chemical, Biological, Radiological and Nuclear Threats,” 72 *Fed. Reg.* 20122, April 23, 2007; and U.S. Department of Health and Human Services, Assistant Secretary for Preparedness and Response, *The Public Health Emergency Medical Countermeasures Enterprise Review: Transforming the Enterprise to Meet Long-Range National Needs*, August 2010.

advanced development contract for a product “that has direct multi-purpose potential for biothreat preparedness and routine healthcare,” in August 2010.<sup>68</sup> Congress may decide that HHS needs further guidance or authorities to encourage the development and acquisition of new broad spectrum countermeasures.

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<sup>68</sup> U.S. Department of Health and Human Services, *Public Health and Social Services Emergency Fund Justification of Estimates for Appropriations Committees FY2012*, p. 52.